Re-Examining Gasperini: Damages Assessments and Standards of Review

Lisa Litwiller
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LISA LITWILLER*

I. INTRODUCTION

In May, 2001, the United States Supreme Court issued its opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*1 While the Court's decision in *Cooper* was undoubtedly correct insofar as its holding goes, the case created a collateral issue for federal courts sitting in diversity under both the *Erie* Doctrine,2 and under the Court's prior precedent as announced in *Gasperini v. Center for Humanities, Inc.*3 In *Cooper*, the Court held that an appellate court reviewing a punitive damages award for Constitutional excessiveness should apply a *de novo* standard because a punitive damage award is not a finding of fact, and, therefore, reviewing the award *de novo* does not invade the province of the jury.4 Conversely, the *Gasperini* Court held that the proper standard of review was abuse of discretion.5 Admittedly, the award in *Gasperini* was compensatory, not punitive, and principled distinctions can be made between the two types of awards, particularly in light of the *Cooper* Court's rationale for application of the *de novo* standard, i.e., that a punitive damage award was not a "fact."6 However, the case poses a problem that goes far beyond a court's having to apply two standards of review, and may rise to constitutional proportions.

The dilemma implicates issues concerning federalism and state sovereignty. Forty-nine states have constitutional provisions that require trial by jury in civil cases.7 Many of these state constitutions are much more

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2. 304 U.S. 64 (1938).
5. 518 U.S. at 438.
6. *But see Consorti v. Armstrong World Indus.*, Inc., 72 F.3d 1003, 1012 (2d Cir. 1995) ("[f]or purposes of deciding whether state or federal law is applicable, the question whether an award of compensatory damages exceeds what is permitted by law is not materially different from the question whether an award of punitive damages exceeds what is permitted by law.").
7. Alabama: ("That the right of trial by jury shall remain inviolate.") ALA. CONST. art. I, § 11; Alaska: ("The right to a jury trial in certain civil trials is guaranteed by the 7th Amendment...") ALASKA CONST. art. I, § 16; Arizona: ("That the right by jury shall remain inviolate.") ARIZ. CONST. art. II, § 23; Arkansas: ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without
regard to the amount in controversy..."") ARK. CONST. art. II, § 7; California: ("Trial by jury is an inviolate right and shall be secured to all...") CAL. CONST. art. I, § 10; Colorado: ("The right of trial by jury shall remain inviolate in civil cases...") COLO. CONST. art. II, § 23; Connecticut: ("The right of trial by jury shall remain inviolate...") CONN. CONST. art. I, § 19; Delaware: ("Trial by jury shall be as heretofore.") DEL. CONST. art I, § 4; District of Columbia: ("The right of trial by jury as declared by the Seventh Amendment to the Constitution as given by an applicable statute shall be preserved to the parties inviolate.") D.C. CONST. R. CIV. P. 38; Florida: ("The right of trial by jury shall be secure to all and remain inviolate.") FLA. CONST. art. I, § 22; Georgia: ("The right of trial by jury shall remain inviolate...") GA. CONST. art. I, § 1; Hawaii: ("the right of trial by jury shall be preserved.") HAW. CONST. art. I, § 13; Idaho: ("The right of trial by jury shall remain inviolate...") IDAHO CONST. art. I, § 7; Illinois: ("The right of trial by jury as heretofore enjoyed shall remain inviolate.") ILL. CONST. art. I, § 13; Indiana: ("In all civil cases, the right of trial by jury shall remain inviolate.") IND. CONST. art. I, § 20; Iowa: ("The right of trial by jury shall remain inviolate...") IOWA CONST. art. I, § 9; Kansas: ("The right of trial by jury shall remain inviolate.") KAN. CONST., B. of R. § 5; Louisiana: ("In his demand a party may specify the issues which he wishes to be tried by jury; otherwise he shall be considered to have demanded trial by jury for all the issues so triable.") LA. C.C.P. art. 1734; Maine: ("In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced...") ME. CONST. art. I, § 20; Maryland: ("That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury.") Md. CONST., Decl. of R., art. V; Massachusetts: ("Right to trial by jury in controversies and suits.") MASS. CONST. pt. 1, art. XV; Michigan: ("The legislature may authorize a trial by a jury of less than 12 jurors in civil cases.") MICH. CONST. art. IV, § 44; Minnesota: ("The right of trial by jury shall remain inviolate...") MINN. CONST. art. I, § 4; Mississippi: ("The right of trial by jury shall remain inviolate...") MISS. CONST. art. III, § 31; Missouri: ("That the right of trial by jury as heretofore enjoyed shall remain inviolate...") MO. CONST. art. I, § 22(a); Montana: ("The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.") MONT. CONST. art. II, § 26; Nebraska: ("The right of trial by jury shall remain inviolate...") NEB. CONST. art. I, § 6; Nevada: ("The right of trial by Jury shall be secured to all and remain inviolate forever...") NEV. CONST. art. I, § 3; New Hampshire: ("In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1,500 and no title to real estate is involved, the parties have a right to a trial by jury.") N.H. CONST. pt. 1, art. 20; New Jersey: ("The right of trial by jury shall remain inviolate...") N.J. CONST. art. I, § 9; New Mexico: ("The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.") N.M. CONST. art. II, § 12; New York: ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever...") N.Y. CONST. art. I, § 2; North Carolina: ("In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.") N.C. CONST. art. I, § 25; Ohio: ("The right of trial by jury shall be inviolate...") OHIO CONST. art. I, § 5; Oklahoma: ("The right of trial by jury shall be and remain inviolate...") OKLA. CONST. art. II, § 19; Oregon: ("In all civil cases the right of Trial by Jury shall remain inviolate.") OR. CONST. art. I, § 17; Pennsylvania: ("Trial by jury shall be as heretofore, and the right thereof remain inviolate.") PA. CONST. art. I, § 6; Rhode Island: ("The right of trial by jury shall remain inviolate.") R.I. CONST. art. I, § 15; South Carolina: ("The right of trial by jury shall be preserved inviolate.") S.C. CONST. art. I, § 4; South Dakota: ("The right of trial by jury shall remain inviolate and shall extend to all cases without regard to the amount in controversy, but the Legislature may provide for a jury of less than twelve in any court not a court of record and the decision of civil cases by three-fourths of the jury in any court.") S.D. CONST. art. VI § 6; Tennessee: ("That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.") TENN.
deferential to civil jury verdicts than the standard commanded by the Seventh Amendment’s Re-Examination Clause,\textsuperscript{8} the very clause that had caused the Court to apply the abuse of discretion standard to damages awards in the past.\textsuperscript{9} In fact, thirty-seven states require that the right to jury trial be “invincible.”\textsuperscript{10} The problem is thus characterized:

De novo review of punitive awards is possible, according to the Supreme Court, only because the right to a jury trial does not include assessment of punitive damages. Yet in most states, the right to a jury

\textsuperscript{8}\textit{Tex. Const.} art. I, § 6; \textit{Texas: (“The right to trial by jury shall remain inviolate.”)}
\textit{UTA. CONST.} art. I, § 10; \textit{Vermont: (“That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury…”)}
\textit{VT. CONST.} ch. I, art. 12; \textit{Virginia: (“That in controversies respecting property, and in suits between man and man trial by jury is preferable to any other…”)}
\textit{VA. CONST.} art. I, § 11; \textit{Washington: (“The right of trial by jury shall remain inviolate…”)}
\textit{WASH. CONST.} art. I, § 21; \textit{West Virginia: (“In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved…”)}
\textit{W. VA. CONST.} art. III, § 13; \textit{Wisconsin: (“The right of trial by jury shall remain inviolate…”)}
\textit{WIS. CONST.} art. I, § 5; \textit{Wyoming: (“The right of trial by jury shall remain inviolate in criminal cases.”)}

\textsuperscript{9} See, e.g., \textit{Barry v. Edmunds}, 116 U.S. 550 (1886)

For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict. . . . [A] verdict will not be set aside in a case of tort for excessive damages “unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated,” that is, “unless the verdict is so excessive or outrageous,” with reference to all the circumstances of the case, “as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.” In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award.

\textsuperscript{10} See \textit{supra} note 7. Although Federal Rule of Civil Procedure 38 seems to mirror this language, saying, “[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate,” the use of the word “invincible” does not modify the Constitution to which the Rule refers. Moreover, even after the adoption of the Rules in 1938, the Court’s jurisprudence has consistently used the Seventh Amendment as its touchstone when confronted with a challenge to a punitive damage award on the basis that a litigant’s right to a jury trial has been usurped. \textit{See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.}, 532 U.S. 424 (2001); \textit{BMW of North America, Inc. v. Gore}, 517 U.S. 559 (1996); \textit{Gasperini v. Center for Humanities, 518 U.S. 415 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).
trial is often declared "inviolate" under the state constitution, and the right will include the punitive damage awarded.\textsuperscript{11}

Moreover, in nearly half the jurisdictions which permit punitive damages, courts apply the most deferential standard of review, abuse of discretion, to appellate oversight of punitive awards. Only a distinct minority apply the de novo standard now seemingly required by the Court's opinion in Cooper.\textsuperscript{12} To the extent that the right to trial by jury is only as good as the litigant's right to have the jury's verdict remain undisturbed absent an abuse of discretion, requiring states to apply the more deferential standard announced by the Court may indirectly impinge upon the right to jury trial, thus implicating a state's rights to order its own affairs.\textsuperscript{13} As one commentator characterized the right,

\begin{quote}
[i]f the inferences drawn by the jury could be cast aside by trial judges or appellate courts merely because the judges regard the jury's inferences, as reflected in the verdict form, as less convincing or reasonable than competing inferences, the right to trial by jury would be rendered considerably less meaningful.\textsuperscript{14}
\end{quote}

Yet, under the Erie Doctrine, the federal courts of appeals are required to apply the forum state's substantive law when reviewing the judgment of a federal district court sitting in diversity.\textsuperscript{15} The Court has held that, for Erie purposes, the standard of review is substantive, rather than procedural.\textsuperscript{16} Thus, in a state that accords a high degree of sanctity to jury verdicts, Erie may require application of the more deferential abuse of discretion standard. Yet, one must also presume that the federal court of appeals are bound by Cooper to apply de novo review. A clash appears inevitable. And although one might argue that the principle upon which Cooper rests—that punitive damages are not a "fact" to be found by the jury, and therefore not entitled to abuse of discretion review in the first instance—it remains the case that the vast majority of jurisdictions which permit punitive damage awards have historically viewed punitive awards as being within the province of the jury. Indeed, until Cooper, such was the view of the Supreme Court.\textsuperscript{17}

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13. U.S. CONST. amend. X.
15. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 64 (1938).
17. See, e.g., Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (punitive damages have "always [been] left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.").
\end{flushright}
Accordingly, Part II of this Article examines the Erie doctrine by tracing the Supreme Court's Erie jurisprudence since that case was decided in 1938. The Court has not always been entirely clear about the application of its prior precedent, making the Erie doctrine confusing at best. Part III surveys the various standards of review employed by courts around the country in general, and to punitive damages awards in particular, in order to more fully flesh out the reverse Gasperini problem raised by Cooper. Part IV compares and contrasts the Gasperini and Cooper decisions regarding the appropriate standards of review, particularly in light of its prior precedent in a long line of cases dealing with punitive damages. Finally, Part V explores the state sovereignty issues and the impact the Court's decision in Cooper may have on the Erie Doctrine.

II. THE RISE OF THE ERIE DOCTRINE

Although it is not the purpose of this Article to engage in a comprehensive analysis of the Erie Doctrine, a review of the Doctrine and its application is crucial to the problem that this Article does endeavor to address. Therefore, this Part will sketch the genesis of the Doctrine and the Court's subsequent application of the principles articulated within the decision.

The Erie saga begins, of course, with the Court's decision in Swift v. Tyson. The issue before the Court was whether a discharge of a previous debt was adequate consideration for a bill of exchange, in which case the endorsee would have enjoyed the status of being a holder in due course, notwithstanding that there were legal impediments to enforcement as between antecedent parties to the note's exchange. The problem lay in that the United States Supreme Court had previously held that such transactions were enforceable, but the New York state courts, the forum in which the transaction arose, did not permit the endorsee to enforce such a note where the original debtor had a valid defense as against an intermediary.

The differences between the federal doctrine and the New York state common law was brought into sharp relief in light of the Federal Judiciary Act, more commonly referred to as the Rules Decision Act ("RDA"), which

20. Id. at 15.
21. Id. at 15-16 ("This doctrine [that a bona fide purchaser is a holder in due course] is so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support.").
22. Id. at 18.
provided that "[t]he laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trial at common law in the courts of the United States in cases where they apply." In other words, if the New York common law constituted "the law" of New York, the defendant would prevail. If not, the plaintiff would.

On this point, Justice Story, writing for a nearly unanimous Court, stated that the Act applied only "to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the right and titles to real estate, and other matters immovable and intra-territorial in their nature and character." Thus, the Court in *Swift* held that the RDA required federal courts to apply state law only where there was an applicable state constitutional provision or state statute, or where the dispute concerned something uniquely tied to the state forum, such as real property. The Court went on to state that the Act "does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

The net effect of this decision was that federal courts were free to disregard the decisions of state courts in matters of general jurisprudence, and particularly with respect to commercial transactions. This gave the federal bench a great deal of leeway in developing "federal common law," and the intent of the Court may have been to foster the development of uniform principles of substantive law in areas not expressly covered by local statutory authority.

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25. *Id.*
26. *Id.* at 19.

Thus, *Swift* v. *Tyson* held that the "laws of the several states" that the federal courts were bound to apply by the Rules of Decision Act included, in addition to state constitutions and statutes, only those state judicial decisions that either construed state constitutional or statutory provisions or dealt with questions of real property or other immovable matters. The decisions of state courts on matters of commercial law, however, could be disregarded by the federal courts in favor of the general principles and doctrines of commercial jurisprudence. In effect, the *Swift* decision gave the federal courts great freedom to develop uniform principles of substantive law in areas neither covered by state statutes nor involving real estate or similarly "local" matters.
The potential for mischief under the Swift case is readily apparent, particularly in terms of the incentive to forum shop, but nowhere was it more evident, and Swift more blatantly abused, than in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.\(^{28}\) In this case, the Brown & Yellow Taxicab Company, a Kentucky corporation, entered into an exclusive dealing contract with a railroad, pursuant to which it undertook to transport passengers to and from the railroad station.\(^{29}\) The railroad did not perform its end of the bargain, however, and permitted a competing taxicab company, the Black & White Taxicab Company, also a Kentucky corporation, to operate on the railroad’s premises.\(^{30}\)

Brown & Yellow wanted to enforce the exclusive dealing contract with the railroad, but it had a problem—Kentucky state courts had long since determined that such contracts were contrary to public policy, and, as a result, had refused to enforce them.\(^{31}\) The federal judiciary, however, had no such “general jurisprudence,” and was inclined to enforce such transactions.\(^{32}\) Thus, if Brown & Yellow wanted to have its contract enforced and successfully enjoin Black & White from soliciting passengers at the railroad station, it must somehow venue the action in federal district court, and must, therefore, find a valid basis of subject matter jurisdiction.

In order to create diversity jurisdiction, Brown & Yellow reincorporated in Tennessee and then brought suit against Black & White and the railroad company in a federal district court in Kentucky.\(^{33}\) Black & White argued that the reincorporation was fraudulent, and done only to create diversity, and should therefore be insufficient to confer subject matter jurisdiction within the federal judiciary. The Court disagreed, noting that “[t]he succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into the motives when deciding concerning their jurisdiction.”\(^{34}\)

Having found subject matter jurisdiction, the Court easily disposed of the case. First, the Court noted that Justice Story had “fully expounded” on the RDA\(^ {15}\) in Swift, and correctly held that “in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of

\(^{28}\) 276 U.S. 518 (1928).
\(^{29}\) Id. at 522.
\(^{30}\) Id. at 523.
\(^{31}\) Id. at 525 (citing McConnel v. Pedigo, 92 Ky. 465 (1892)).
\(^{32}\) Id. at 528. The Court stated that “[t]he cases cited show that the decisions of the Kentucky Court of Appeals holding such arrangements are invalid contrary to the common law as generally understood and applied.”). Id.
\(^{33}\) Black & White Taxi Cab, 276 U.S. at 523.
\(^{34}\) Id. at 524.
\(^{35}\) Id. at 530.
the state in which the controversy arises, are free to exercise their own independent judgment.”36 Thus, the Court held that subject matter jurisdiction was established, notwithstanding the artificial nature of it, and that federal “general common law” applied. Since the federal law permitted such exclusive contracts, the Court issued the injunction, a result that would never have obtained in a Kentucky court.

This holding prompted an eloquent dissent by Justice Holmes, which was joined by Justices Brandies and Stone. In Justice Holmes’s view, the rules arising out of Swift and its progeny amounted to “an unconstitutional assumption of powers by the Courts of the United States . . . .” He argued that “no lapse of time or respectable array of opinions should make us hesitate to correct it.”37 Justice Holmes was concerned with state sovereignty and worried that the Swift Doctrine “permitted the federal courts to declare rules of law in areas beyond the powers delegated to the federal government by the Constitution.”38

Ten years, virtually to the day, after Justice Holmes issued his challenge in Brown & Yellow, the Court laid to rest the specter of Swift in Erie v. Tompkins.39 The facts are familiar. Mr. Tompkins was walking along a pathway adjacent to the railroad tracks when he was struck and injured by an open freight door protruding from a passing train.40 The injury occurred in Pennsylvania, where Mr. Tompkins was domiciled, but he brought his action in federal district court for the Southern District of New York. Venue was proper because the Erie Railroad Company was a citizen of New York, and subject matter jurisdiction was based upon diversity.41

At issue was whether Pennsylvania decisional law or federal common law applied. Under Pennsylvania law, as announced by its highest court, Mr. Tompkins was a mere trespasser, and Erie would be liable only if its actions constituted “wanton or willful” negligence.42 On the other hand, Mr. Tompkins contended that no such law had been established by the Pennsylvania courts, and, relying on Swift, argued that even if it had, because there was no statute in place, federal common law applied.43 Under federal common law, the railroad was liable if it were guilty of simple negligence.44 The trial judge refused to apply the Pennsylvania decisional law, and the jury

36. Id.
37. Id.
38. Wright, supra note 27, at § 4502.
39. 304 U.S. 64 (1938).
40. Id. at 69.
41. Id.
42. Id. at 70.
43. Id.
44. Erie, 304 U.S. at 70.
awarded $30,000 in damages, which award was affirmed by the Second Circuit Court of Appeal.\textsuperscript{45}

The Court framed the issue as "whether the oft-challenged doctrine of \textit{Swift v. Tyson} shall now be disapproved."\textsuperscript{46} Justice Brandeis, who had joined the dissent in \textit{Brown & Yellow}, began his analysis by quoting extensively from Justice Story's opinion in \textit{Swift}, in which the Court concluded that the RDA was never intended by the framers to apply to anything other than positively stated statutory law.\textsuperscript{47} Justice Brandeis then noted that "[d]oubt" had been "repeatedly expressed" regarding the correctness of the \textit{Swift} Court's interpretation, and cited to an article by Professor Warren which, according to the Court, "established that the construction given to [the RDA] was erroneous . . . .\textsuperscript{48} The better construction of the Act, according to Professor Warren, and adopted by the Court, was that "in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the laws of the state, unwritten as well as written."\textsuperscript{49}

Apart from its historical analysis, the Court cited several reasons for overruling \textit{Swift}. The Court did refer to the difficulty in distinguishing between "local" matters governed by state law, and "questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation,"\textsuperscript{50} but the primary bases for reversing \textit{Swift} were twofold. First, the application of federal common law in diversity cases resulted in "grave discrimination by noncitizens against citizens" and thereby "rendered impossible equal protection of the law."\textsuperscript{51} This unequal application of law, in the Court's view, improperly incentivized forum shopping.\textsuperscript{52} This rationale gave rise to the oft-cited "twin aims" of \textit{Erie}: to discourage forum-shopping and to avoid the inequitable administration of the laws as between state and federal courts.\textsuperscript{53}

The second constitutionally based rationale was grounded in principles of federalism. The Court asserted that conferring upon the federal courts the ability to make law in abrogation of state law unconstitutionally exceeded the

\begin{footnotes}
\footnote{45. \textit{Id.}}
\footnote{46. \textit{Id.} at 69.}
\footnote{47. \textit{See id.} at 71-72.}
\footnote{49. \textit{Erie}, 304 U.S. at 72-73.}
\footnote{50. \textit{Id.} at 71.}
\footnote{51. \textit{Id.} at 74-75.}
\footnote{52. \textit{Id.}}
\footnote{53. \textit{See id.}}
\end{footnotes}
powers granted to the federal government and encroached upon authority reserved to the states.\textsuperscript{54} In this regard, the Court declared that

whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power on the federal courts.\textsuperscript{55}

Interestingly, the debate over what constitutes state substantive law and federal procedural law, a debate which has thoroughly occupied subsequent applications of \textit{Erie}, is not referenced in the majority opinion. Rather, the substance/procedure dichotomy is first raised in Justice Reed's concurrence, where he opines that "[i]f the opinion commits this Court to the position that Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion . . . seems questionable. The line between procedural and substantive law is hazy, but no one doubts federal power over procedure."\textsuperscript{56} With respect to the line between substance and procedure being fuzzy, Justice Reed was prophetic, as the Court's subsequent jurisprudence would amply demonstrate.

For example, in \textit{Sibbach v. Wilson & Co., Inc.}\textsuperscript{57} the Court was concerned about whether a discovery rule promulgated in the then recently adopted Federal Rules of Civil Procedure would apply.\textsuperscript{58} In this regard, some background is necessary. The Federal Rules of Civil Procedure had been promulgated by the Supreme Court pursuant to authority granted by Congress in the Rules Enabling Act (REA), whose own authority derived from Article I and the Necessary and Proper Clause.\textsuperscript{59} Because the REA legitimately delegates rulemaking authority in connection with the Federal Rules of Civil Procedure, those Rules are to be tested against the language of the REA to determine whether a challenged rule falls within the scope of the Supreme Court's delegated authority.\textsuperscript{60} In order to be valid, a Federal Rule of Civil Procedure must relate to the "practice and procedure of the district courts" and

\begin{enumerate}
\item \textit{Erie}, 304 U.S. at 79.
\item \textit{Id.} at 78.
\item \textit{Id.} at 91-92.
\item 312 U.S. 1 (1941).
\item \textit{Id.} at 2.
\item U.S. CONST. art. I.
\item See, e.g., Hanna v. Plumer, 380 U.S. 460 (1965).
\end{enumerate}
the rule may not “abridge, enlarge or modify” any substantive rights of the litigants.\textsuperscript{61}

The basis of the plaintiff’s argument in \textit{Sibbach} was that the defendant was attempting to subject her to a physical examination pursuant to Federal Rule 35.\textsuperscript{62} The case was heard in federal district court for the Northern District of Illinois. Decisional law applicable in Illinois at the time did not recognize the validity of such exams.\textsuperscript{63} Ms. Sibbach conceded that the rule, which concerned discovery, was arguably procedural, but contended that it improperly invaded her substantive rights to the extent that it encroached upon public policy as described in the Illinois state courts.\textsuperscript{64}

In resolving the dispute, the Court first looked to the scope of power delegated pursuant to the REA, and concluded that “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States . . . .”\textsuperscript{65} In the same breath, however, the Court also recognized that Congress “never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose . . . .”\textsuperscript{66} Accepting these two principles as true, the question became whether a rule is within the delegated authority, that is, whether it addresses a procedural issue, and whether, notwithstanding its characterization as “procedural,” it nonetheless alters substantive rights in some fashion.

\begin{itemize}
\item 61. 28 U.S.C. § 2072 (1994). The applicable text reads as follows:
(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.
\item 62. See \textit{Sibbach v. Wilson}, 312 U.S. 1 (1941). Federal Rule 35 provides, in pertinent part, [w]hen the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. . . .
\item 64. \textit{Sibbach}, 312 U.S. at 11.
\item 65. \textit{Id.} at 9-10.
\item 66. \textit{Id.} at 10.
\end{itemize}
Given that Ms. Sibbach had conceded that Rule 35 was procedural, the issue ultimately turned upon whether an admittedly procedural discovery device employed to resolve the substantive question of liability itself violated Ms. Sibbach’s “substantive” right to be free from physical examination. If so, the Rule would exceed the authority delegated to the Court by the REA in that it would “abridge, enlarge or modify any substantive right.”

In determining that Rule 35 did not impinge upon any substantive right, the Court made a distinction between “substantive” rights for purposes of interpreting the REA, and those rights that are “substantial” or “important.” The Court implicitly conceded that the right to be free from “invasion of the person” was an important right, but not “substantive” for purposes of an analysis of its validity of the REA. In this regard, the Court stated that

[i]f we were to adopt the suggested criterion of the importance of the alleged right, we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

From this conclusion, it was easy for the Court to proceed to characterize that the claimed “right” arose only in connection with the conduct of the litigation itself, and was therefore not violative of the REA.

Interestingly, just as the Erie majority did not refer to “substance” or “procedure,” those two distinctions are certainly implied, and, perhaps, thrown into sharper relief by the adoption of the Federal Rules of Civil Procedure, neither did the Sibbach majority define “substance” or “procedure.” Nonetheless, as Professor Ides observes,

the overall sense of the usage is clear enough. Substantive law refers to those rights and obligations that exist outside of the context of litigation and which create enforceable standards of behavior pertaining to everyday life, such as the negligence standard at issue in Sibbach. Procedural law provides the method for enforcing those standards in the context of litigation.

67. Id. at 11.
69. Sibbach, 312 U.S. at 14.
70. Id.
71. Id.
72. Id.
73. Ides, supra note 18, at 32.
Perhaps, but the application of these standards has proved elusive in the succeeding years.

Consider, for example, the next case in the *Erie* line. In *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.* the Court faced the question of whether a conflicts of law determination was substantive or procedural for purposes of an *Erie* analysis. The dispute arose over a contract that was executed in New York, and a part of the contract was performed in New York, although performance was rendered in other states as well. Ultimately, the plaintiff, Stentor, brought suit in federal district court in Delaware, alleging diversity jurisdiction, and, after a jury trial, was awarded $100,000.

The plaintiff then moved the court to amend the judgment to reflect pre-judgment interest pursuant to a New York law which permitted pre-judgment interest, even on an unliquidated sum. The motion was granted and affirmed on appeal by the Second Circuit Court of Appeals, which stated that the New York law was applicable because

it is clear by what we think is undoubtedly the better view of the law that the rules for ascertaining the measure of damages are not a matter of procedure at all, but are matters of substance which should be settled by reference to the law of the appropriate state according to the type of case being tried in the forum.

The Supreme Court took a dim view of this, categorically stating in a very brief, unanimous decision that *Erie* prohibits "such independent determinations by the federal courts" and that determinations of what law applies should be made by looking to what the state courts would do when faced with a conflict. The Court stated "[o]therwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." The Court went on to explain that "[i]t is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws."

Although the *Klaxon* case is frequently overlooked in the *Erie* commentary, it is interesting precisely because it engages in a "pure" *Erie* analysis and invokes the "twin aims"—discouragement of forum-shopping and avoidance of inequitable administration of the laws—while simultaneously

74. 313 U.S. 487 (1941).
75. *Id.* at 494.
76. *Id.*
77. *Id.* at 494-95.
78. *Id.* at 495-96.
79. *Klaxon Co.*, 313 U.S. at 496.
80. *Id.*
81. *Id.*
invoking another significant underpinning of *Erie* that is often overlooked. When the Court refers to thwarting local policies, it is, of course, referring to a state’s Tenth Amendment right to be free from federal intrusions into the state’s sovereignty.

Such was the status of the *Erie* doctrine when the Court issued its rather unfortunate opinion in *Guaranty Trust Co. v. York*. 82 In *York*, plaintiffs brought a class action against a bond trustee alleging misrepresentation and breach of trust. 83 In response, the defendant alleged that the suit was barred by New York’s statute of limitations. 84 The plaintiffs argued that the federal standard of laches should apply because the suit sounded in equity rather than in law, and, therefore, the suit was not barred. 85 The trial court granted summary judgment in favor of Guaranty Trust on the theory that the suit was precluded by the statute of limitations. 86 The Second Circuit found the suit was not precluded and further held that the suit was not time-barred because the equitable doctrine of laches applied. 87

The Supreme Court disagreed. After a discussion about the traditional distinction between law and equity, the Court characterized the issue as having reduce[d] itself to the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties. Is the outlawry, according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity when that court’s jurisdiction is dependent on the fact there is a State-created right, or is such statute of "a merely remedial character," which a federal court may disregard? 88

In answer to that question, the Court created the now lamented "outcome determinative" test, and moved away from trying to make a principled distinction between "substance" and "procedure." In particular, the Court stated,

[t]he question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to

82. 326 U.S. 99 (1945).
83. *Id.* at 100.
84. *See id.* at 100-01.
85. *See id.* at 101.
86. *Klaxon Co.*, 313 U.S. at 100-01.
87. *Id.* at 101.
88. *Id.* at 107-08.
recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard the law of a State that would be controlling in an action upon the same claim by the same parties in a State court? 89

Further refining its outcome determinative litmus test, the Court continued,

[i]t is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. [Erie] was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, it would be if tried in a State court. The nub of the policy that underlies [Erie] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. 90

Justice Frankfurter, writing for the Court, asserted that the purpose of Erie was to ensure that the happenstance of the forum should be irrelevant to the substantive rights of the parties, and that, therefore, the result of the litigation should be substantially the same in federal court as in state court, while allowing for differing methodologies by which that substantially similar outcome was achieved. 91 It does not require an intuitive quantum leap to recognize that a statute of limitations, which is by definition outcome determinative to the extent that the case is barred, is "substantive" for purposes of the outcome determinative test.

The case is unfortunate not only because it ignored the federalism concerns expressed in Erie as further support for the result, but also because if the "outcome determinative" test is applied consistently, virtually every procedural rule will be outcome determinative. Suppose, for example, that a so-called "local rule" requires pleadings to be three-hole punched. If a litigant

89. Id. at 109.
90. Id.
were to fail to comply with the rule, the court clerk would refuse the filing, and the dispute would never be heard. The example is, perhaps, a trifle disingenuous, practically speaking (one assumes the litigant would simply three hole-punch the pleading and refile), but it does highlight the theoretical absurdity of the strictly outcome determinative test expressed in *York*.

Professor Floyd, expressing similar concerns, stated the problem as follows:

*York* thus carried *Erie* well beyond rules of “substance” as understood to encompass the prescription of rights and duties governing the primary conduct and relations of the parties and even beyond the realm of “substance” as understood to refer to legal rules having objectives external to the fair and efficient conduct of the litigation process itself.\(^92\)

The next significant development in the *Erie* doctrine was the issuance by the Supreme Court of a trilogy of cases, each of which was issued on the same day. The first in the trilogy, *Ragan v. Merchants Transfer & Warehouse Co.*,\(^93\) likewise concerned a state statute of limitations, but with a twist. The plaintiff had filed his complaint in the federal district court in Kansas within the two-year limitation period, but failed to serve the defendant within the prescribed time. Under the Federal Rules of Civil Procedure,\(^94\) the filing of a complaint tolls the limitation period, but Kansas’s statutory scheme did not recognize the commencement of an action for tolling purposes until service was effected.\(^95\)

Justice Douglas, writing for the Court, followed *York* with little analysis of the “twin aims” of *Erie* and with even less regard for the federalism concerns that prompted the Court to overrule *Swift* fewer than ten years earlier. The Court merely recited the alleged purpose of *Erie*, which it rather simplistically reduced to denying recovery in the federal system if “recovery could not be had in the state court.”\(^96\) The Court simply stated that because the plaintiff had conceded that recovery could not be had in a Kansas court, the rationale of *Guaranty Trust* mandated dismissal by the federal court.

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94. Rule 3 provides that “a civil action is commenced by filing a complaint with the court.” Fed. R. Civ. P. 3.
95. See Ragan, 337 U.S. at 531. The applicable statute provided that “[a]n action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him . . . .” Id. at 531 n.4.
96. Id. at 532.
A preferable, or at least a more intellectually honest, approach that the Ragan Court could have taken is one analogous to that applied in Sibbach. Thus, the question should not have been whether the outcome would be identical in both federal and state courts, a proposition which was never the original focus of Erie in any event. If one applies the “spirit” of Erie—which, in essence, focuses on the proper distribution of power between sovereign states and the federal system—the better question would have been whether Rule 3 was valid under the REA. It seems almost beyond dispute that Rule 3 is “procedural,” and, therefore, within the delegated authority of the REA. The real question is whether the Rule acts to “abridge, enlarge or modify any substantive right.”\textsuperscript{97} And therein lies the proverbial rub. If the Court had held that the Rule does act to “enlarge” a substantive right, as it arguably did in this case, then the Court would have had to declare Rule 3 invalid under the REA. Rather than do that, it took the lockstep outcome determinative test announced in York and simply declared that if Mr. Ragan could not maintain his suit in a Kansas state court, neither could he maintain it in federal district court.

The second case in the trilogy, also authored by Justice Douglas, was \textit{Woods v. Interstate Realty}.\textsuperscript{98} In that case, the plaintiff was a real estate brokerage that sued an individual for recovery of a commission allegedly earned.\textsuperscript{99} However, the brokerage, a Tennessee corporation, had failed to register for a license to do business in Mississippi, where the suit was vened in the federal district court.\textsuperscript{100} The trial court granted the defendant’s motion for summary judgment on the grounds that the contract was “void under Mississippi law, since respondent was doing business in Mississippi without qualifying under a Mississippi statute.”\textsuperscript{101} The Fifth Circuit reversed, holding that “the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The state of Mississippi is without authority to limit or extend the jurisdiction of the federal courts.”\textsuperscript{102}

The Supreme Court reversed the Fifth Circuit, once again relying heavily on York and repeating its mantra that where “one is barred from recovery in the state court, he should likewise be barred in the federal court.”\textsuperscript{103} The Court even went as far as to repeat what it said in \textit{Guaranty Trust} that a federal district court, sitting in diversity, should be no more than a clone of its state

\begin{itemize}
\item \textsuperscript{98} 337 U.S. 533 (1949).
\item \textsuperscript{99} \textit{Id.} at 535-36.
\item \textsuperscript{100} \textit{Id.} at 536.
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} Interstate Realty Co. v. Woods, 168 F.2d 701, 705 (5th Cir. 1948).
\item \textsuperscript{103} Woods, 337 U.S. at 538.
\end{itemize}
counterpart: "[F]or purposes of diversity jurisdiction a federal court is ‘in effect only another court of the State." 104

The final case in the trilogy is *Cohen v. Beneficial Industrial Loan Corporation*. 105 *Cohen* was a shareholder derivative action filed in federal district court in New Jersey. The New Jersey legislature had recently adopted a statute that required plaintiffs in shareholder derivative suits to post a security bond sufficient to pay the corporation’s cost of defense, including attorneys’ fees, if the suit were unsuccessful. 106 The district court denied the defendant’s motion to order the plaintiffs to post bond, and the Third Circuit reversed, pursuant to a writ of mandamus. The Supreme Court granted certiorari and affirmed the Third Circuit’s conclusion that the statute was substantive, rather than procedural, thereby ordering the plaintiff to post the bond. 107

The Court began its analysis of the *Erie* issue by quoting the RDA and stating that *Erie* had held that the common, or decisional, law of the several

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104. *Id.* (quoting *Angel v. Bullington*, 330 U.S. 183, 187 (1946)).
105. 337 U.S. 541 (1949).
106. *Id.* The applicable New Jersey statute provides:
1. In any action instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation having a total par value or stated capital value of less than five per centum (5%) of the aggregate par value or stated capital value of all the outstanding shares of such corporation’s stock of every class ... unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars ($50,000.00), the corporation in whose right such action is brought shall be entitled, at any stage of the proceeding before final judgment, to require the complainant or complainants to give security for the reasonable expenses, including counsel fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to law, its certificate of incorporation, its by-laws or under equitable principles, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter, from time to time, be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive.
2. In any action, suit or proceeding brought or maintained in the right of a domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation, it must be made to appear that the complainant was a shareholder or the holder of a voting trust certificate at the time of the transaction of which he complains or that his share or voting trust certificate thereafter devolved upon him by operation of law.
3. This act shall take effect immediately and shall apply to all such actions, suits or proceedings now pending in which no final judgment has been entered, and to all future actions, suits and proceedings.

*Id.* at 544-45 n.1.

107. *Id.* at 556-57.
states was "law" within the meaning of the RDA.\textsuperscript{108} Adhering to its prior pronouncement in \textit{York} that federal courts were simply an extension of state courts when sitting in diversity, the opinion recognized that \textit{Erie} and its progeny "have wrought a more far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business."\textsuperscript{109}

Three Justices dissented, including Justice Douglas, who had authored the opinions in \textit{Ragan} and \textit{Woods}.\textsuperscript{110} The thrust of Justice Douglas's dissent was that the statute at issue was purely procedural in that it did not add or subtract "one iota" from the substantive cause of action, but rather prescribed a procedural mechanism by which a disgruntled shareholder could institute and maintain a cause of action.\textsuperscript{111}

This analysis seems flawed. While it may be true that the elements the plaintiff would have to prove to prevail in her cause of action are not altered, her ability to bring and maintain the suit was dependent upon her ability to post the bond, which she apparently could not do. To that extent, the bond-posting statute requiring her to post a bond "closed the courthouse" doors to her to the same extent as the suits were foreclosed in \textit{Ragan} and \textit{Wood}. Thus, in order to be consistent, Justice Douglas should have joined the majority.

The more compelling dissent was penned by Justice Rutledge, who had dissented in \textit{Ragan} and \textit{Wood} as well.\textsuperscript{112} Justice Rutledge disapproved of the mechanical application of the outcome determinative test announced in \textit{York}, saying that, in his view, "the three decisions taken together demonstrate the extreme extent to which the Court is going in submitting the control of diversity litigation in the federal courts to the states rather than to Congress, where it properly belongs."\textsuperscript{113} Justice Rutledge appeared to recognize that the Court's \textit{Erie} jurisprudence was taking it into an alternative universe in which a species of a "reverse" supremacy clause was applicable and in which federal procedural law, rightly the domain of Congress and the Supreme Court under Articles I and III of the Constitution, respectively, must always bow to state law.\textsuperscript{114}

\textsuperscript{108} \textit{Id.} at 555.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Woods}, 337 U.S. at 557 (Douglas, J., dissenting).
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.} (Rutledge, J., dissenting). Justice Rutledge's written dissent in \textit{Cohen} is incorporated by reference into the decisions announced by the Court in \textit{Ragan} and \textit{Wood}. \textit{Id.} at 557-58 (Rutledge, J., dissenting).
\textsuperscript{113} \textit{Id.} at 558 (Rutledge, J., dissenting).
\textsuperscript{114} \textit{See Woods}, 337 U.S. at 559 (Rutledge, J., dissenting) ("It is the gloss which has been put upon the \textit{Erie} ruling by later decisions which in my opinion is being applied to extend the \textit{Erie} ruling far beyond
These three cases were, in many ways, the highwater mark of deference to state law. The Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* attempted to refine the outcome determinative test, but may have succeeded only in adding to the confusion. At issue in *Byrd* was the statutory scheme adopted by the South Carolina legislature regarding workers’ compensation for injured employees. The statutes contemplated that the judge, rather than the jury, would decide the putative employee’s status, which, in turn, would determine whether the plaintiff could seek compensation apart from that which he or she is statutorily entitled to receive, whereas in the federal scheme this was a factual matter for the jury. The Court split five to four on this issue, but ultimately resolved it in favor of adopting federal practice, thus signaling a retreat from the rigid outcome determinative test.

The Court began its analysis by asserting that *Erie* requires a federal district court to “respect the definition of state created rights and obligations by the state courts,” and then modified the statement, saying that a state rule need only be applied where it is “bound up” with rights and obligations as defined by the state substantive law. The Court concluded that there was no evidence that the allocation of decision making authority contemplated by the state statutory scheme was “an integral part” of the statute, but rather “merely a form and mode of enforcing the immunity” rather than “a rule intended to be bound up with the definition of the rights and obligations of the parties.”

The Court then proceeded to apply the outcome determinative test, and conceded that “[i]t may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury.” However, the Court said, “outcome” was not the sole arbiter of the issue. Rather, there were “countervailing considerations” in an independent federal system that “distributes trial functions between judge and jury and, under the influence—if not the command—of the

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116. Indeed, until the Court issued its opinion in *Gasperini*, the only reference to *Byrd* was in *Hanna*, and then only for the proposition that “[o]utcome determination analysis was never intended to serve as a talisman.” *Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965).
117. *Id.* at 527.
119. *Id.* at 535.
120. *Id.*
121. *Id.* at 536.
122. *Id.* at 537.
123. *Byrd*, 356 U.S. at 537.
Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.\textsuperscript{124}

Having thus backed away from the pure outcome determinative test articulated in \textit{York}, and followed so religiously in \textit{Ragan, Woods} and \textit{Cohen}, the Court reframed the test as follows: "the inquiry here is whether the federal policy . . . should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court."\textsuperscript{125}

\textit{Byrd} is generally read as establishing a "balancing test" which requires a federal court to balance the federal interest in applying a federal rule of procedure against the state's interest in "furthering the objective that the litigation should not come out one way in the federal court and another way in the state court."\textsuperscript{126} It should not, however, be assumed that the pendulum has swung all the way back to the point where any federal interest trumps the state interest. As the \textit{Byrd} Court made clear, the key to the analysis is whether the state rule is concerned only with the "form and mode" of the litigation and not some other state interest unconnected with the manner in which a substantive right is vindicated. Any other interpretation would violate the core of \textit{Erie} by unconstitutionally permitting federal intervention into legislative authority reserved to the states by the Tenth Amendment and the Constitution's overall scheme of reserved powers.

As one commentator opined,

many of the terms used in \textit{Byrd}, such as "bound up" and "form and mode," are not self-defining, and the process of identifying and weighing interests seems more art than science. But even with the uncertainty, \textit{Byrd} gives a sophisticated model. It embraces three modes of analysis—a functional inquiry (in assessing "bound up," an outcome determination inquiry, and a balancing inquiry. It corrects the fixation on outcome determination by making it one factor (not the sole factor) in the RDA analysis. By recognizing three interests—(1) some federal systemic interest, (2) the state interest in governing the primary activity of citizens, and (3) the litigant interest in uniformity of outcome—and by embracing the concept of balancing, the Court reinvigorated principles of federalism in the vertical choice of law equation.\textsuperscript{127}

\textsuperscript{124} \textit{Id.} (footnote omitted).
\textsuperscript{125} \textit{Id.} at 538.
\textsuperscript{126} \textit{Id.}
The next significant development occurred in the landmark case of *Hanna v. Plumier*. At issue in *Hanna* was whether the federal court should apply the state’s requirement that an executor be served “in hand” or the standard adopted in Rule 4, which permits service by leaving copies of the summons and complaint at the defendant’s residence. The plaintiff had served the defendant by leaving copies of the summons and complaint at his residence with his spouse, but did not personally serve him within the statutory limitations period.

Relying on *Ragan* and *York*, the defendant argued that, because service was inconsistent with the state standard, and that the plaintiff’s case would be barred in state court for that reason, it should likewise be barred in federal court. A not unreasonable argument, based upon the Court’s prior precedent. Realizing, however, that the outcome determinative test proves too much in the sense that virtually every procedural rule could be outcome determinative in some sense, the Court took yet another step away from *Guaranty Trust*.

The Court began this distancing process by citing *Byrd* for the proposition that “‘[o]utcome determination’ analysis was never intended to serve as a talisman.” Rather, the outcome determination test must be read with “reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.” Moreover, the Court asserted, when there is a Federal Rule of Procedure on point, the correct analytic structure is that undertaken in *Sibbach*.

That is, the function of the district court in determining which rule to apply is to ascertain whether the Federal Rule in question is truly procedural in that it falls within the boundaries of the authority delegated by the REA. If it is, it controls, even where application of the Federal Rule will yield an outcome different from that which would be obtained in state court.

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131. *Id.* at 461-62.
132. *Id.* at 468 (“[I]n this sense every procedural variation is ‘outcome-determinative.’”).
133. *Id.* at 466-67.
134. *Id.* at 468.
136. *Id.* As the Court put it, *wh*en a situation is covered by one of the Federal Rules, *th*e question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule and can refuse to do so only if the Advisory Committee, this Court and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

*Hanna*, 380 U.S. at 471.
Although this result seems contrary to the Ragan-Woods-Cohen trilogy in that there were Federal Rules at issue in each of those cases, the Court distinguishes those cases by asserting that the Rules at issue there were not broad enough to encompass the contrary state rule.\textsuperscript{137} Thus, we are left with the anomalous result that state procedural rules dictate when an action is commenced for purposes of tolling the statute of limitations, even in the face of Federal Rule 3 which states that “[a] civil action is commenced by filing a complaint with the court,”\textsuperscript{138} but Federal Rules concerning the method of service apply even in the face of contrary state rules.

The effect of Hanna, then, is to bifurcate Erie analysis even beyond the procedure/substance dichotomy.\textsuperscript{139} First, if there is a federal procedural rule on point, it governs provided it is within the scope of the REA. This result is necessitated because Congress and the Supreme Court, pursuant to Articles I and III respectively, have the authority to promulgate rules of procedure to be applied in federal courts, and the Supremacy Clause mandates that such rules take precedence over state created rules.\textsuperscript{140} In short, so long as the Rule can be “rationally classified”\textsuperscript{141} as relating to the “practice and procedure” of the district courts,\textsuperscript{142} the Federal Rule applies, even where application of the Federal Rule would be outcome determinative. This is the Sibbach-Hanna line of cases.\textsuperscript{143}

The second sub-species of Erie concerns those cases in which there is no applicable Federal Rule. In that instance, the touchstone is not the REA, but rather the RDA, with the gloss of Erie, York and Byrd. The Hanna Court correctly refers to this latter analysis as the “typical, relatively unguided Erie Choice . . .”\textsuperscript{144} According to the Court,

\textsuperscript{137} Id. at 472.
\textsuperscript{138} FED. R. CIV. P. 3.
\textsuperscript{139} See, e.g., Freer, supra note 127.
\textsuperscript{140} See U.S. CONST. art. I, § 8, cl. 8 and art. III, §§ 1 and 2, cl.2.
\textsuperscript{141} Hanna, 380 U.S. at 472.
\textsuperscript{143} Not all commentators agree that the somewhat mechanical application of the Sibbach/Hanna formulation for REA cases is a judicial step forward in Erie analysis. See, e.g., Michael A. Berch & Rebecca White Berch, An Essay Regarding Gasperini v. Center for Humanities, Inc. and the Demise of the Uniform Application of the Federal Rules of Civil Procedure, 69 Miss. L.J. 715, 723 (1999) (“Never mind that the state rule may be ‘bound-up with the rights and obligations of the parties.’ Disregard such formerly controlling concerns as outcome determination, forum shopping, or inequitable administration of the laws. If a federal rule is directly on point and it arguably regulates procedure, apply it. The Rules Enabling Act, rather than the Rules of Decision Act, became the touchstone. The Court cavalierly distinguished those precedents refusing to follow a federal rule as having decided only that the federal rule did not directly apply.”).
\textsuperscript{144} Hanna, 380 U.S. at 471.
Erie and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against the citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.\textsuperscript{145}

After the paradigm shift in Hanna, the Court continued to struggle with the Erie doctrine, hearing cases in which it primarily applied the Sibbach-Hanna formulation. For example, in Walker v. Armco Steel Corporation\textsuperscript{146} the Court was once again faced with a state tolling provision that differed from Federal Rule 3. In Walker, the applicable state statute did not deem the action "commenced" until service of the summons and complaint upon the defendant,\textsuperscript{147} whereas an action is "commenced" under Rule 3 when the complaint is filed.\textsuperscript{148} The district court dismissed the plaintiff's claim and the Tenth Circuit affirmed.\textsuperscript{149}

Before the Supreme Court, the plaintiff argued that Ragan had been implicitly overruled by Hanna,\textsuperscript{150} a not entirely unlikely proposition. The Court disagreed. The Court first invoked York and repeated its central tenet: where no recovery could be had in a state court, the federal district court would provide no relief.\textsuperscript{151} The Court also reaffirmed Ragan, stating that the Court would not give the "[cause of action] longer life in the federal court than it would have had in the state court without adding something to the cause of action."\textsuperscript{152} The Court declined to apply the REA analysis established in Hanna saying that the Hanna analysis is "premised on a 'direct collision' between the Federal Rule and the state law."\textsuperscript{153} The question, then, became "whether the

\textsuperscript{145} Id. at 468, n.9.
\textsuperscript{146} 446 U.S. 740 (1980).
\textsuperscript{147} Id. at 742. The state scheme had a saving clause which permitted tolling, provided the complaint was filed within the limitations period, as was the case in Walker, if the summons was served within sixty days of filing. Through the inadvertence of counsel, the summons was not served until well after the sixty day period had expired.
\textsuperscript{148} FED. R. CIV. P. 3.
\textsuperscript{149} Walker, 446 U.S. at 743-44.
\textsuperscript{150} See id. at 743.
\textsuperscript{151} Id. at 745.
\textsuperscript{152} Id. at 746 (emphasis in original).
\textsuperscript{153} Id. at 749.
scope of the Federal rule in fact is sufficiently broad to control the issue."\textsuperscript{154} Of course, this is precisely the basis upon which the Court distinguished Hanna from Ragan, and since the Court here reaffirmed Ragan, the Court likewise reiterated its position that Rule 3 is not broad enough to "collide" with the state statutory scheme, and, therefore, REA analysis was inapplicable.\textsuperscript{155}

Because the Hanna rationale was inapplicable, the Court proceeded to do an Erie-York analysis and found that "state service requirements . . . are an integral part of the state statute of limitations [and] should control in an action based on state law which is filed in federal court under diversity jurisdiction."\textsuperscript{156} The Court declined to elucidate how that statement illuminated the Erie-York doctrine, contenting itself with a further reference to Ragan.\textsuperscript{157}

Next came Burlington Northern Railroad Co. v. Woods.\textsuperscript{158} There, the plaintiffs had obtained a money judgment against the defendant, and the defendant appealed.\textsuperscript{159} The forum state, Alabama, had a mandatory affirmance statute which required a losing appellant to pay a ten percent penalty, provided that the trial court had entered a money judgment, the judgment was stayed for the appellant posting bond and the judgment was affirmed without substantial modification by the appellate court.\textsuperscript{160} All three conditions were met in this case and the plaintiff moved the Eleventh Circuit Court of Appeals for an order imposing the penalty, which the court granted.\textsuperscript{161}

In reversing the Eleventh Circuit, the Supreme Court engaged in a Sibbach/Hanna analysis, based upon Rule 38, which provides that "[i]f the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."\textsuperscript{162} The Court observed that according to the Advisory Committee's Notes, the rule permits a court to award damages as a matter of discretion.\textsuperscript{163} After reciting the now familiar delegation of Constitutional authority to promulgate the Federal Rules, and reminding the reader of the presumption of validity, the Court, predictably, found that Rule 38 did not exceed the scope of the REA.\textsuperscript{164}

\textsuperscript{154} Walker, 446 U.S. at 749.
\textsuperscript{155} See id. at 750-52.
\textsuperscript{156} Id. at 754.
\textsuperscript{157} Id.
\textsuperscript{158} 480 U.S. 1 (1987).
\textsuperscript{159} Id. at 2.
\textsuperscript{160} Id.
\textsuperscript{161} See id.
\textsuperscript{162} Id. at 4 (quoting Fed. R. Civ. P. 38).
\textsuperscript{163} Burlington Northern, 480 U.S. at 4.
\textsuperscript{164} See id.
The question then became whether Rule 38 "occupied the field" with respect to an appellate court's ability to assess penalties for frivolous appeals. Adopting the Fifth Circuit's reasoning in *Affholder, Inc. v. Southern Rock, Inc.*, the Court found that it did. First, the Court noted that the discretionary nature of the penalty assessment described in Rule 38 directly conflicted with the mandatory nature of the Alabama affirmandence penalty. Second, the Rule contemplated penalizing only frivolous appeals, whereas the Alabama statute penalized all appellants, regardless of the merits of their appeal. The Court concluded that

the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmandence statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions.

The next case to utilize the *Sibbach/Hanna* REA analysis concerned not a Federal Rule, but a federal statute. At issue in *Stewart Organization, Inc. v. Ricoh Corporation* was a forum selection clause that the defendant sought to enforce by moving the district court for a transfer pursuant to Section 1404 of the United States Code. The forum state, however, was judicially hostile to forum selection clauses, and so the district court denied the motion, but certified the question for interlocutory appeal. The Eleventh Circuit, sitting *en banc*, reversed, holding that the forum selection clause was "enforceable generally as a matter of federal law." The Supreme Court affirmed the Eleventh Circuit "under somewhat different reasoning."

The Court began by distinguishing the "relatively unguided *Erie* choice" from the "straightforward exercise in statutory interpretation" contemplated in the *Sibbach-Hanna* analytic structure. Citing to *Walker and Burlington Northern*, the Court stated that "when the federal law sought to be applied is a congressional statute, the first and chief question for the district

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165. 746 F.2d 305 (5th Cir. 1984).
167. *Id.* at 8.
168. *Id.* at 7.
172. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1071 (11th Cir. 1987) (*en banc*).
174. *Id.* at 26.
175. *Id.*
court’s determination is whether the statute is "sufficiently broad to control the issue before the Court."176 If the district court concludes that the "federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress’s authority under the Constitution."177 The court then observed that because "the constitutional authority of Congress to enact § 1404(a) is not subject to serious question,"178 the district court must use the discretion granted by the statute to resolve the parties’ forum dispute. The Court explained that the forum selection clause must be balanced against the forum state’s interest in refusing to enforce such clauses, but that neither was to be accorded determinative weight.179 The Court therefore remanded the issue back to the district court for analysis in light of its opinion.180

The final piece of the post Hanna puzzle, apart from Gasperini, which is discussed at length in Part IV, infra, is Chambers v. Nasco.181 Chambers recites a tawdry tale of attorney misconduct and abusive litigations tactics which led the district court to award sanctions against the defendant, Mr. Chambers, in the amount of nearly $1,000,000.182 After holding that the sanctions were within the inherent power of the district court, and that such discretion was not delimited by Rule 11 or Rule 26,183 the Court addressed Mr. Chambers’s argument that even if district courts had the authority to impose the sanctions, they were free to do so in diversity cases only to the extent that the law of the forum state permitted fee shifting for bad faith conduct.184

In particular, Mr. Chambers argued that the district court’s invocation of the "bad faith" exception to the American Rule, which forbids fee shifting, was a thinly disguised method of imposing punitive damages for breach of contract, primarily because the district judge relied on prelitigation conduct.185 Because punitive damages are not permitted under Louisiana law for breach of contract, he argued, the sanctions violated the Erie Doctrine.186 Writing for the five-member majority, Justice White’s opinion gave this argument short shrift, and repeated the statement in Hanna that the outcome determinative test established in York “cannot be read without reference to the twin aims” of the

176. Id.
177. Id. at 27.
178. Stewart Org., Inc., 487 U.S. at 32.
179. Id. at 30-31.
180. Id. at 32.
182. Id. at 40. In addition to this award, the district court had, among other things, ordered Mr. Chambers to pay compensatory damages in connection with several contempt proceedings and had sanctioned Mr. Chambers’s counsel by disbarring one and suspending the other. Id. at 41, n.5.
183. Id. at 42.
184. Id. at 51.
185. Chambers, 501 U.S. at 54.
186. Id. at 52.
Erie doctrine.\textsuperscript{187} Without much analysis, the court concluded that its judgment did not encourage forum shopping and did not result in an inequitable administration of the laws.\textsuperscript{188}

Having surveyed the Court's jurisprudence in connection with the Erie Doctrine, it is useful to review the various standards of review employed by courts before embarking upon the analysis that is the core of this Article: what standard of review should be used by appellate courts in reviewing jury assessed punitive damages awards conferred in a federal district court sitting in diversity. Accordingly, the next Part of this Article examines the standards of review used not only in the several States, but in the federal circuit courts of appeal as well.

III. STANDARDS OF REVIEW

In general, standards of review have been described as the powers of limitation that distribute power throughout the judicial system and separate the duties of the different courts in that system.\textsuperscript{189} Standards of review are most commonly used in referring to the authority an appellate court has in hearing and ruling on appeals from the trial court. It is important to distinguish standards of review from scopes of review. An appellate court's scope of review refers to the portion of the record that the court may review or examine to determine whether or not the lower court, usually the trial court, erred.\textsuperscript{190} A standard of review, on the other hand, refers to the criteria by which a lower court's decision will be measured by the higher court in determining whether the lower court's decision was correct.\textsuperscript{191} The standards of review thus become the parameters that an appellate court must use in determining not only if the lower court erred, but also whether that mistake warrants reversal.\textsuperscript{192}

Standards of review serve three primary functions in the appellate court system. They allow the appellate court to correct, supervise, and provide instruction on the proper interpretation of the law.\textsuperscript{193} The corrective aspect is the ability of a reviewing court to eliminate any mistakes made by the lower court during the trial.\textsuperscript{194} The second function, supervision, is directly related to the first, to the extent that a district judge is mindful of the possibility of

\textsuperscript{187} Id.
\textsuperscript{188} Id. at 53.
\textsuperscript{190} Id. at 359.
\textsuperscript{192} Hall, supra note 189, at 356.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
scrutinizing review and the attendant possibility of reversal. Finally, the instructive aspect allows a higher authority to explain, develop, and clarify legal concepts in order to assist the lower court in understanding the law and making better decisions both at the present and in the future. An appellate court exercising these three functions, separately or simultaneously, guides and governs a jurisdiction.

Generally speaking, standards of review are based, in large part, on whether the issue under review is one of “fact” or one of “law.” At the broadest level, issues of fact are reviewed under the most deferential category because of the respect accorded to jury findings. Issues of law, on the other hand, generally receive a heightened degree of scrutiny, because appellate courts are believed to be as competent, or more competent, than their lower court brethren. That having been said, however, there are many standards of review, each with its own respective function and degree of scrutiny. The three most common standards of review are de novo, abuse of discretion, and clearly erroneous, but over thirty different variations have been documented including: broad discretion, clear discretion, gross discretion, manifest discretion, heighted discretion, review, sound discretion, inconsistency with findings, substantial evidence rule, ore tenus, scintilla, highest level of scrutiny, competent substantial evidence, non-deferential, any evidence, plain legal error, rational basis, reasonableness, substantial relationship, manifest weight of the evidence, any legal theory, prima facie error, correction of error at law, prejudicial error, at law, on error, on assigned error, substantial justice, credible and reasonable, free of the appearance of bias, deviates materially, competent evidence, narrow certiorari, reasonable trier of fact, substantial evidence, plain error, plainly and palpably wrong, clear and convincing, harmless error, and reasoned support.

The primary difference between these standards is the different components of the law that they analyze and the extent to which that analysis is done. For example, the substantial evidence standard looks to the evidence in the lower court’s record whereas the abuse of discretion standard looks at the inherent authority of the district judge in the exercise of his or her power.

195. Id.
198. See, e.g., Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 1962) (a “finding of fact, to which the clearly erroneous rule applies, is a finding based on the ‘fact-finding tribunal’s experience with the mainsprings of human conduct.’ A conclusion of law would be a conclusion based on [the] application of a legal standard.”).
and the clearly erroneous standard looks at the overall picture, even beyond the lower court’s record. 200 Which standard applies in any given situation depends on the nature of the error being appealed and whether the lower proceeding was a jury trial or not. 201 In jury trials, substantial deference is given to the findings of fact pursuant to the Seventh Amendment, and in particular to the Re-examination Clause, which mandates deference to the jury’s factfinding function. 202

The lowest standard of deference to the findings in the lower court is the de novo standard of review. 203 This is a full review of the lower court record and is usually applied to questions and errors in law. 204 A reviewing court, when applying the de novo standard, is not concerned with merely determining if the lower court erred, but it is also the court’s intent to insure that the appropriate party will prevail on appeal. Thus, the de novo standard has been described as a “right or wrong” standard of review. 205

The clearly erroneous standard was described by the United States Supreme Court when it stated, “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” 206 The final standard commonly used is abuse of discretion. This standard has been described as a ruling that is “clearly against logic.” 207 The reviewing court does not view the decision in order to determine if it agrees with the lower court’s ruling, but rather to assess whether the lower court acted so arbitrarily as to evidence an abuse of its authority. 208 This standard is used in most pre-trial procedural issues, rulings made during trial, and orders for a new trial. 209

Among the vast areas of the law in which an appellate court must apply standards of review, the following discussion will focus on the topic of jury verdicts, and more specifically, to excessive punitive damages awards. This is the area of appellate review that has recently been brought into controversy by the Court’s decisions in Gasperini and Cooper. The debate rests on the inevitable clash between state standards of review for courts of appeal and the

202. Id. at 580-81.
203. See id. at 621.
204. Id.
205. Maloy, supra note 199, at 611.
207. Maloy, supra note 199, at 630.
208. Id.
de novo standard recently applied by the Supreme Court in hearing appeals for excessive punitive verdicts.\textsuperscript{210} It is important, therefore, to have an understanding of what standards of review the states have imposed on their appellate courts.\textsuperscript{211}

A. Jurisdictions That Have Considered Cooper

1. State Jurisdictions Which Have Declined to Follow Cooper or Distinguished Cooper

As of this writing, only a handful of jurisdictions have had the opportunity to review punitive damages awards in light of Cooper, and not all of them are inclined to follow Cooper. For example, the New Mexico Court of Appeals recently considered whether punitive damages awarded in connection with a retaliatory discharge were excessive.\textsuperscript{212} The court began by noting that “New Mexico has traditionally afforded latitude to juries in setting punitive damage awards if the issue is properly submitted.”\textsuperscript{213} The court then observed that “the amount of punitive damages ‘is left to the sound discretion of the jury’” and declared that only where the record, viewed in the light most favorable to upholding the award, revealed that the verdict was the product of “passion and prejudice” would the appellate court disturb the verdict.\textsuperscript{214} The court specifically noted that it was “counseled not to disturb jury damage awards except in extreme cases.”\textsuperscript{215}

The court then turned to a discussion of Cooper and recited the essential holding of Cooper which is that punitive damage awards should be reviewed de novo because a punitive award is not a “fact” to be found by the jury.\textsuperscript{216} In declining to follow Cooper, the New Mexico Court of Appeals stated,

As a result, the [Cooper] standard accords no deference to the jury’s decision on the amount of punitive damages. In contrast, New Mexico recognizes that juries may be better situated to answer the


\textsuperscript{212} Seitzinger v. Trans-Lux Corp., 40 P.3d 1012 (N.M. Ct. App. 2001), cert. granted, 40 P.3d 1008 (N.M. 2002) (No. 27,272).

\textsuperscript{213} Id. at 1022.

\textsuperscript{214} Id. (citing Chavez-Ray v. Miller, 658 P.2d 452, 454 (N.M. Ct. App. 1982).

\textsuperscript{215} Id. at 1023.

\textsuperscript{216} Id.
question of what encompasses an appropriate punitive damage award in a particular case. Thus, our case law requires courts to provide reasonable deference to the jury’s verdict. As such, our approach is structurally different. [The Defendant] urges us to accept and adopt the [Cooper] approach. We decline the invitation because New Mexico has a well-developed, familiar, and successful standard of review which we are loathe to discard absent some compelling reason to do so. We do not interpret [Cooper] to impose de novo review as a matter of federal constitutional imperative. Rather, it appears to be an appellate procedural option for the federal courts. We are thus free to apply our own standard as a matter of constitutional law. 217

The Appellate Division of the Superior Court of New Jersey likewise elected to find Cooper to be only “instructive.” 218 There, the court overturned a punitive award granted to the plaintiff in a sexual harassment case. The court stated that the standard of review following a jury verdict and denial of post trial motions for remittitur or new trial was that "verdicts should be overturned as excessive only in 'clear cases'" 219 and that "the jury's evaluation should be regarded as final" if its verdict has 'reasonable support in the record.'" 220 The court declared that an appellate court "may not reverse a trial judge’s denial of a motion for new trial ‘unless it clearly appears that there was a miscarriage of justice under the law.’" 221

Applying this standard to the award, the court did find the punitive portion of it excessive, based upon various procedures in the trial court, including the trial judge’s refusal to grant a continuance for counsel to prepare. 222 At the end of the opinion, the court turned to the Cooper case, and stated that although it found Cooper “instructive,” it likewise found that it does “not control our final analysis.” 223 Thus, the court in New Jersey applied a much more deferential standard than that called for by Cooper. Accordingly, there are currently two jurisdictions 224 which have expressly declined to follow Cooper and in which the substantive state standard of review differs from, and is more deferential than, that mandated in Cooper.

217. Seitzinger, 40 P.3d at 1023 (citations omitted).
219. Id. at 1098 (citing Caldwell v. Haynes, 653 A.2d 564 (N.J. 1994)).
220. Id. (citations omitted).
221. Id. at 1099.
222. Id. at 1100-03.
223. Lockley, 779 A.2d at 1107.
224. These are lower court decisions, and could be reversed on appeal. Indeed, certiorari has been granted in Seitzinger. See 40 P.3d 1008 (N.M. 2002) (No. 27,272).
The Oregon Court of Appeals took a different tack. In *Bocci v. Key Pharmaceuticals, Inc.* 225 the court reiterated the standard of review adopted by the Oregon Supreme Court:

[T]he standard for post verdict judicial review of an award of punitive damages is as follows: A jury’s award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue. 226

After reviewing the United States Supreme Court’s opinion in *Cooper*, the Oregon court stated that Oregon had never required deferential review of punitive damage awards and concluded that “[n]othing in [*Cooper*] calls into question the ‘rational juror’ standard of review announced by the Oregon Supreme Court.” 227 Thus, although the Oregon court distinguished *Cooper*, it continued to apply the “rational juror” test. 228

In *Simon v. San Paolo U.S. Holding Company, Inc.*, an unpublished opinion, 229 the California Court of Appeal interpreted *Cooper* in an unusual fashion. While it acknowledged that *Cooper* requires *de novo* review of punitive damages awards and purported to follow *Cooper*, the point is open to debate. In *Simon*, the appellant challenging the award had argued that *Cooper* mandates *de novo* review of conflicting factual issues. 230 In response, the California court stated that

[w]e disagree. Although the Court held that we must determine the constitutionality of a punitive damage award under a *de novo* standard of review, it explained by analogy to the review of the imposition of criminal fines and the determination of probable cause in criminal cases, that reviewing courts must independently apply a constitutional standard to the facts of a particular case, but should defer to the factual findings of the trial court unless they are “clearly erroneous.” 231

The California court relied upon footnote fourteen in the *Cooper* opinion, in which the Court stated that “[w]hile we have determined that the Court of

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226. Id. at 1109 (quoting Parrot v. Carr Chevrolet, Inc., 17 P.3d 473 (Or. 2001)).
227. Id. at 1111.
228. Id.
230. Id. at *3.
231. Id.
Appeals must review the District Court’s application of the Gore test de novo, it of course remains true that the Court of Appeals should defer to the District Court’s findings of fact unless they are clearly erroneous.” 232 In affirming the punitive damage award, the court concluded that the implied factual findings of the jury were not clearly erroneous, and then applied the three-part test announced by the Supreme Court in BMW v. Gore233 on a de novo basis.234

Finally, an appellate court in Indiana declined to review an award of punitive damages under a de novo standard, holding that,

Indiana courts will not reverse an award of punitive damages as being excessive unless the damages appear so unreasonable as to indicate that the fact finder was motivated by passion or prejudice. A judgment awarding punitive damages that is a product of fair procedures is cloaked with a strong presumption of validity . . . [and] the amount of the award rests within the sound discretion of the “fact finder” . . . . That being the case, the amount of the award rested within the trial court’s sound discretion and we will review the award for an abuse of that discretion.235

The court acknowledged that Cooper requires de novo review of constitutionally excessive awards, but found that the appellant had not raised any such issues and, therefore, the appropriate standard of review was abuse of discretion under Indiana law.236

2. State Jurisdictions Which Have Adopted Cooper

As of this writing, only two state supreme courts have addressed the issue and neither of those decisions are, as yet, officially published, though both explicitly adopt Cooper.237 In Campbell v. State Farm Mutual Automobile Insurance Company,238 the Utah Supreme Court elected to follow Cooper, stating

the Supreme Court held that federal due process requires a federal appellate court to review punitive damage awards de novo when they

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235. Stroud v. Lints, 760 N.E.2d 1176, 1180 (Ind. Ct. App.) (citations omitted). While this was an appeal following a bench trial, the court made it clear that its holding was equally applicable to a jury verdict.
236. Id.
237. Unpublished opinions are subject to revision or withdrawal and may not be relied upon as precedent by litigants.
are challenged on constitutional grounds. In view of the applicability of fourteenth amendment standards to state courts, we adopt the *de novo* standard for reviewing jury and trial court conclusions...  

Under Utah law, the review is guided by a seven factor test announced by the Utah Supreme Court in a pair of tandem cases, *Crookston v. Fire Insurance Exchange*  

(Crookston I) and *Crookston v. Fire Insurance Exchange* (Crookston II). Thus, a punitive damage award is subject to *de novo* review and the Utah courts will look to 1) the relative wealth of the defendant; 2) the nature of the alleged misconduct; 3) the facts and circumstances surrounding such conduct; 4) the effect thereof on the lives of the plaintiff and others; 5) the probability of future recurrence of the misconduct; 6) the relationship of the parties; and 7) the amount of actual damages awarded. The net effect of this combination of standard of review is that an appellate body must review facts found by the jury *de novo*.

The Alabama Supreme Court took up the issue in *Horton Homes, Inc. v. Brooks*. The court began by noting that in the past, when “reviewing claims that punitive damages awards were excessive, we have given deference to the jury’s award.” Citing to an earlier case, the court pointed out that “[i]n remitting a punitive damages award, we must remit only that amount in excess of the maximum amount that a properly functioning jury could have awarded.” In response to the judicially created standard of review, the Alabama legislature enacted a statute which stated that “[n]o presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of fact.” The Alabama Supreme Court held that the legislation was unconstitutional, and refused to apply it. After reviewing *Cooper*, however, the Alabama court stated that “[t]oday, [ten] years later, relying on the United States Supreme Court’s decision in [Cooper], this Court will begin applying the standard of review directed by the Legislature in 1987.” After reviewing the award *de novo*, the court ordered a remittitur.

The Georgia Court of Appeals likewise elected to adopt *Cooper*, and was of the view that the Georgia Supreme Court had adopted it as well. In *Kent v.*

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239. *Id.* at *4.
244. *Id.* at *10.
245. *Id.*
246. *Id.* (citing *ALA. CODE 1975 § 6-11-23(a) (2001)).
249. *Id.* at *12.
White, the court explained that the Georgia Supreme Court had issued certiorari in the case and remanded it back to the court of appeals with the "Delphic" command that it be reviewed in light of Cooper. From this, the court of appeals inferred that "the Supreme Court of Georgia has adopted the standard of de novo review in all excess punitive damages cases. Therefore, in compliance with the express mandate of the Supreme Court of Georgia, we make a de novo review applying the due process constitutional criteria as set forth in [Gore]." Moreover, the court of appeals expressly adopted the reasoning in Cooper that a punitive damage award does not implicate Seventh Amendment concerns because punitive damages are not a fact to be found by the jury. Accordingly, the court simply computed the permissible amount of punitive damages and remanded to the trial court for it to enter judgment. At least one commentator is of the view, with which this author agrees, that this judicial mandate regarding the standard of review may violate the state's sovereignty.

Because state constitutions provide an independent source of rights and are not subservient to the construction given the federal Constitution, Cooper cannot construe the meaning of the state jury trial guarantees. It would be an act of amazing hubris for a state court—in effect, a judicially declared amendment of the state's constitution—to override the state's guarantee of the right to a jury trial and jettison the jury's authority over punitive damages.

And yet, it appears that this is precisely what the Georgia, Utah and Alabama Supreme Courts have done.

Two other intermediate courts of appeal have considered Cooper. In a somewhat opaque decision, the Florida Court of Appeals adopted the de novo standard for constitutionally based challenges, but retained the state standard of review for non-constitutional claims. After distinguishing the federal criteria set forth for excessiveness in Gore from Florida's statutory scheme, the court observed that only one state criterion tracked the federal standard, and stated that the standard for a state appellate court under the applicable statute was either abuse of discretion or close scrutiny. The court then stated, "[i]n contrast, the United States Supreme Court has held that when punitive damages are challenged as excessive on federal constitutional grounds, the

251. Id. at *5.
252. Id. at *6.
253. Id. at *9.
254. Peck, supra note 11, at 53.
256. Id.
appellate court’s review of the award must be pursuant to a de novo standard.\textsuperscript{257} The court applied the de novo standard and remanded the case to the trial court for further proceedings.

\textbf{B. State Jurisdictions Which Have Not Addressed Cooper}

In those jurisdictions which have yet to address Cooper, the majority of the states apply the deferential abuse of discretion or clearly erroneous standards when reviewing punitive damages awards. The Supreme Court of Alaska issued an opinion after the Supreme Court announced its decision in Cooper, but declined to address Cooper. In Mapco Express, Inc. v. Faulk,\textsuperscript{258} that court held that the appellate court will review a punitive damages claim under a clearly erroneous standard and will reverse only where the award is "manifestly unreasonable, the result of passion or prejudice, or entered in disregard of rules of law."\textsuperscript{259}

Those jurisdictions which engage in deferential review can be further divided into broad subcategories concerning the threshold of review. Jurisdictions that review for abuse of discretion and that will only overturn the jury verdict where the award "shocks the conscience of the court" include Michigan,\textsuperscript{260} Mississippi,\textsuperscript{261} Pennsylvania,\textsuperscript{262} Rhode Island,\textsuperscript{263} and South Carolina.\textsuperscript{264} The following states apply abuse of discretion, and will only overturn the verdict where it appears the award was the product of the "passion and prejudice" of the jury: Arizona,\textsuperscript{265} Delaware,\textsuperscript{266} Oklahoma\textsuperscript{267} and Vermont.\textsuperscript{268}

Several other jurisdictions apply the abuse of discretion standard, and will affirm the award provided that there is "substantial evidence" to support the award. These jurisdictions include Connecticut,\textsuperscript{269} Idaho,\textsuperscript{270} Montana,\textsuperscript{271} New

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257. \textit{Id.} at 1113.
258. 24 P.3d 531 (Ak. 2001).
259. \textit{Id.} at 536.
266. Young v. Frase, 702 A.2d 1234 (Del. Sup. 1997).
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Hampshire and Virginia. Three states, Colorado, Tennessee and Texas, apply abuse of discretion and will reverse only if the verdict appears to be the product of “passion or prejudice” on the part of the jury. Minnesota applies the clearly erroneous test, and will reverse the verdict when it appears “unreasonable.” Nevada reviews for abuse of discretion and will not overturn an award which is supported by “substantial clear and convincing evidence of malice.” New York at one time applied the “shocks the conscience test,” but now applies the statutorily mandated “deviates materially” test. New York courts continue to review for an abuse of discretion.

A handful of states apply abuse of discretion, but do not clearly state the threshold for reversal. These include Hawaii, Illinois and Maine. Another handful of states has established a threshold, but have not clearly identified the standard of review, though it is clearly more deferential than de novo review. These include Kentucky, North Dakota, Ohio, South Dakota, and Wisconsin, and Wyoming. Other standards of review applied in state appellate courts at various times include: plain and palpable,

281. See id.
288. Grynberg v. Citation Oil & Gas Corp., 573 N.W.2d 493 (S.D. 1997).
clear and convincing, rational basis, plainly excessive, factual sufficiency.

In some states, two or more standards have been combined to form one standard for appellate review. For example, Washington’s standard states that “an appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.” Finally, there are two states in which no standard of review has been acknowledged by the common law in appeals of excessive verdicts. Both Maryland and North Carolina give such a high level of deference to the lower court’s jury determinations that neither state recognizes an appeal on the terms of an excessive verdict.

Only three states, Arkansas, Iowa and West Virginia, reviewed punitive damage awards de novo prior to Cooper.

C. Federal Appellate Review

Federal appellate courts have traditionally used the abuse of discretion standard when reviewing the excessiveness of jury verdicts. The Second,
Fourth, Fifth, Sixth, and Seventh Circuits, along with the District of Columbia and the Federal Circuit still adhere to that standard while other circuits have adapted to the recent changes developed in *Gasperini* and *Cooper*. Since the *Cooper* decision, the First and the Ninth Circuits have applied the *de novo* standard to all issues involving excessive jury verdicts. The Eighth, Tenth, and Eleventh Circuits use a combination; they utilize the abuse of discretion standard in most cases, but will also apply the *de novo* standard if the appeal arises under a claim of a due process violation challenging the constitutionality of the amount awarded.

Having generally surveyed the standards of review for excessive damages in the several States and circuit courts of appeal, a brief discussion of the procedural mechanisms by which such awards are reviewed is warranted. Generally speaking, a defendant faced with an excessive verdict will move the court for a new trial pursuant to Rule 59. Rule 59 authorizes a district court to grant a new trial to either party on "all or part of the issues." Where warranted, the judge may order a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Whether to grant a new trial is typically a matter of discretion for the trial court. That does not mean, however, that appellate courts will necessarily review a lower court's decision on a motion for new trial under a pure abuse of discretion standard. According to one commentator, "[h]ow the abuse of discretion standard plays out in each context

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305. Knussman v. Maryland, 272 F.3d 625, 639 (4th Cir. 2001); Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 301 (4th Cir. 1998).
308. Mathur v. Bd. of Trustees of S. Illinois Univ., 207 F.3d 938, 944 (7th Cir. 2000); Riemer v. Illinois Dep't of Trans., 148 F.3d 800, 808 (7th Cir. 1998).
312. Swinton v. Potomac Corp., 270 F.3d 794, 802 (9th Cir. 2001).
313. Foster v. Time Warner Entr't Co., 250 F.3d 1189, 1194 (8th Cir. 2001).
316. FED. R. CIV. P. 59.
317. Id.
319. See, e.g., International Paper Co. v. Town of Jay, 887 F.2d 338 (1st Cir. 1989).
depends in turn on the circumstances of each case, the type of alleged error underlying the motion, and the traditional applications to that context.\textsuperscript{320}

In response to a motion for a new trial, the court may order the plaintiff to accept a remittitur in lieu of a new trial. Remittitur is a form of reducing the judgment, provided that the plaintiff is willing to accept the reduced amount rather than face the uncertainty of a new trial.\textsuperscript{321} Because the district judge has discretion to order a new trial, it follows that remittitur falls under the same standard, and that any such decision will be reviewed for abuse of that discretion.\textsuperscript{322} Thus, "assuming the trial court's damages decision may be reviewed at all, it will not be reversed absent an abuse of discretion."\textsuperscript{323}

Assuming, then, that the proper federal standard of review for a trial court's reduction of a damage award is abuse of discretion, as the Court held in \textit{Gasperini}, how does one reconcile that fact with the Court's holding in \textit{Cooper} which requires \textit{a de novo} review? And which standard should apply, the federal standard or the state standard? The materials that follow address these issues.

IV. \textbf{GASPERINI AND COOPER: A CLASH OF THE STANDARDS OF REVIEW AND THE \textit{ERIE} PROBLEM}

In \textit{Gasperini},\textsuperscript{324} the plaintiff brought suit in Federal District Court for the Southern District of New York. He claimed damages in connection with the disappearance of three hundred photographic transparencies that the defendant had admittedly lost. At trial Mr. Gasperini introduced expert testimony that each of the transparencies had a commercial value of $1,500, and the jury, apparently believing this testimony, awarded him $450,000.\textsuperscript{325} The defendant moved for a new trial pursuant to Rule 59 alleging, \textit{inter alia}, that the verdict was "excessive." The trial court denied the motion without comment.\textsuperscript{326}

On appeal the defendant, the Center for Humanities, argued that the award was inconsistent with the New York standard for compensatory awards and that \textit{Erie} commanded compliance with the New York standard.\textsuperscript{327} As part of an attempt to enact tort reform, the New York legislature had adopted a statute pursuant to which New York appellate courts were to review the amount awarded by juries and to order new trials when the jury's award


\textsuperscript{321} \textit{See}, \textit{e.g.}, Dimick v. Schiedt, 293 U.S. 474 (1935).


\textsuperscript{323} Childress, supra note 320, at 289.

\textsuperscript{324} 518 U.S. 415 (1996).

\textsuperscript{325} \textit{Id.} at 420.

\textsuperscript{326} \textit{Id.}

\textsuperscript{327} \textit{Id.}
"deviates materially from what would be reasonable compensation." The Second Circuit agreed with this proposition and concluded that the $450,000 verdict did "materially deviate[] from what is reasonable compensation."

In reaching this conclusion, the appellate court surveyed several other, comparable cases, and concluded that, even "[d]rawing all reasonable inferences in favor of Gasperini," no more than fifty of the transparencies were

328. Id. at 418. The entire text of the statute at issue is as follows:
(a) Generally, from final judgment. An appeal from a final judgment brings up for review:
1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;
2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;
3. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;
4. any remark made by the judge to which the appellant objected; and
5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.
(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.
(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.
(d) Appellate term. The appellate term shall review questions of law and questions of fact.

N.Y. C.P.L.R. § 5501(c) (McKinney 1995).

truly unique and could have been worth the $1,500 value placed upon all three hundred slides by the jury. As to the remaining two-hundred-fifty slides, the court determined that "any damage award of more than $100 per transparency would be excessive." The Second Circuit therefore vacated the district court's judgment and ordered a new trial unless Mr. Gasperini was willing to accept a remitted award of $100,000. Mr. Gasperini was not, and he appealed to the United States Supreme Court.

Justice Ginsburg, writing for the five-member majority, stated that the case presented "an important question" regarding the intersection of the Erie Doctrine, standards of review and the Seventh Amendment. The Court began by noting that the federal standard for granting a new trial based upon excessive damages was whether the award "shocked the conscience" of the district court. The district court's determination was to be disturbed on appeal only if the denial of the motion for new trial was an abuse of discretion. New York courts had applied the same principles prior to 1986.

However, when the New York legislature adopted Section 5501(c), the state standard was modified to the "materially deviates" standard, which the legislature intended to be a much more stringent standard than "shocks the conscience," and, indeed, the New York courts so held. The Center argued that Erie and its progeny required the Second Circuit to apply the more exacting New York standard, as it had done, and, therefore, its decision was correct. In response to this, Mr. Gasperini argued that the Seventh Amendment precluded such review because it required the appellate court to "re-examine" a fact found by the jury.

Conceding that the standard of review was simultaneously "substantive" and "procedural" for purposes of the Erie doctrine, the Court framed the issue as follows: "The dispositive question, therefore, is whether federal courts can give effect to the substantive thrust of [the New York standard] without untoward alteration of the federal scheme for the trial and decision of civil

330. Id.
331. Id.
332. Id.
334. Id.
335. Id. at 422-23 (citing Martell v. Boardwalk Enter., 748 F.2d 740 (2d Cir. 1984)).
336. Id. at 423.
337. Id.
340. Id.
341. Id.
cases.”

Justice Ginsburg then briefly recounted the Court’s *Erie* jurisprudence, hearkened back to *York’s* outcome determinative test, and reminded the reader that *Hanna* had reduced the sweep of the test, modifying it by requiring it to be applied only in light of the “twin aims” of *Erie*, which are to discourage forum shopping and to encourage equitable application of the law.

Accordingly, the Court next queried whether “application of the [standard] . . . [has] so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court.”

Addressing the first prong of the *Erie* twin aims test, the Court concluded first that the New York standard was “substantive” and because the federal “shocks the conscience” test would permit substantially larger awards in federal court than that which would be available in the New York state court, it would encourage forum shopping. Likewise, the Court concluded that the state legislature’s purpose in adopting the standard was to foster equitable, and therefore predictable, results in the state courts. Because the “twin aims” were implicated, failure to apply the state standard in the federal court would violate the *Erie* Doctrine.

The problem, however, that remained was that permitting the Second Circuit to do what it did—review a factual record and substitute its judgment for the jury’s—violated the Re-examination Clause of the Seventh Amendment, thereby ignoring “[a]n essential characteristic of [the federal court] system.” In order to resolve this dilemma, the Court proceeded from the proposition that Rule 59 permits district courts to order a new trial “for any reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.” From this entirely innocuous principle, the Court went on to concede that it had never “expressly [held] that the Seventh Amendment allows appellate review of a district court’s denial of a motion to set aside an award as excessive.”

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342. *Id.*
343. *Id.* at 428.
345. *Id.* at 429-30.
346. *Id.* at 429.
347. *Id.* at 431 (citing *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 537 (1958)). Interestingly, apart from a single cite in *Hanna*, this is the first time the Court has cited to *Byrd* since it was decided in 1958.
348. PED. R. CIV. P. 59.
However, noted the Court, the Circuit Courts of Appeals had routinely been reviewing district courts’ decisions on motions for a new trial for an abuse of discretion, and such review had at least been implicitly condoned by the Supreme Court. Moreover, the Court quoted its previous decision in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.* for the proposition that

[T]he role of the district court is to determine whether the jury’s verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court’s determination under an abuse-of-discretion standard.

Applying these principles, the Court concluded that “the principal state and federal interests can be accommodated” by an allocation of authority between the district court and the federal appellate body. The Court’s solution was to permit the federal district court to apply the New York standard when adjudicating a motion for a new trial based upon excessive damages, but the appellate body could only review the motion under an abuse of discretion standard. The Court did not address why it is constitutionally permissible for the district court to re-examine facts found by the jury, which presumably is likewise violative of the Seventh Amendment which precludes any court, not just appellate courts, from re-examining facts, but merely implied that at the time of the Amendment’s adoption in 1791, common law trial courts in England routinely reviewed jury verdicts.

This deficiency was the focus of a lengthy dissent. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, took the view that the Court’s decision in *Gasperini* “overrules a longstanding and well reasoned line of precedent that has for years prohibited federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence.” He was likewise troubled that the majority relied upon a series of appellate decisions which undertook such review, stating that

350. *Id.* at 435.
353. *Id.* at 437.
354. *Id.*
355. *Id.* at 438.
356. *Id.* at 457 (Scalia, J., dissenting)("[A]t common law, ‘reexamination’ of the facts found by a jury could be undertaken only by the trial court, and appellate review was restricted to writ of error which could challenge the judgment only upon matters of law.").
357. *Gasperini,* 528 U.S. at 448-49.
"[i]t is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment’s restriction of federal court review of jury findings has outlived its usefulness."^{358}

Rather, in Justice Scalia’s view, the Court should have undertaken a *Sibbach/Hanna* analysis. Justice Scalia argued that the Court should have relied upon Rule 59, which provides that “[a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law.”^{359} He then cited federal precedent for the proposition that Rule 59 has been construed “to permit the granting of new trials where ‘it is quite clear that the jury has reached a seriously erroneous result’ and letting the verdict stand would result in ‘a miscarriage of justice.’”^{360} Finding that Rule 59 is “sufficiently broad” to cause a ‘direct collision’ with the state law, or, implicitly to ‘control the issue before the court,’” the dissenting Justices were of the opinion that the better course would have been to apply Rule 59 without reference to the state standard.

Thus, the essential holding of *Gasperini* is that, for *Erie* purposes, an appellate standard of review is substantive if the outcome would differ as between federal and state courts so as to encourage forum shopping and unequal administration of law. To the extent that the state standard is substantive, the district court sitting in diversity must apply it, and the appellate courts, constrained by the Seventh Amendment, may reverse only to the extent that the district court abused its discretion.

The above constituted the state of the law on this issue until the Court delivered its opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*^{361} At issue in *Cooper* was the proper standard of review when an appellate court was called upon to determine the constitutionality of a particular punitive award, as opposed to a compensatory award as had been the issue in *Gasperini*.^{362} With respect to punitive damages generally, the Court’s consensus was that punitive damages awards had a long historical pedigree in both English and American common law and were therefore, generally speaking, constitutional.^{363} Moreover, under the Seventh Amendment, punitive damages awards were to be awarded by juries, not judges, though judges had oversight power through traditional common law mechanisms, such

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358. *Id.* at 449.
362. *Id.*
as a motion for a new trial, directed verdict, judgment notwithstanding the verdict and remittitur.\textsuperscript{364}

However, punitive damages awards could become unconstitutional to the extent the awards were a product of insufficient process, which, in turn resulted in arbitrary awards that reflected the unconstrained discretion of the jury. These awards were unconstitutional because they were thought to violate the procedural prong of the due process guarantee.\textsuperscript{365} Likewise, awards violated the Fifth and Fourteenth Amendments in a substantive sense when the awards were "grossly excessive." Awards were grossly excessive when they were out of proportion to the reprehensibility of the defendant's conduct, there was a great disparity between the harm suffered by the plaintiff and the amount of the award and the award is completely out of step with other awards made in comparable cases.\textsuperscript{366}

This notwithstanding there was substantial uncertainty about what standard to use when reviewing such an award. Typically, any fact found by a jury is subject only to an abuse of discretion review. Thus, to the extent that punitive awards are set by juries, the amount of the award was subject only to appellate reversal if the trial court had abused its discretion in entering the judgment.\textsuperscript{367} This, however, created tension between the Seventh Amendment, on the one hand, and the Fifth and Fourteenth Amendments, on the other. Assuming that each of the Amendments is of equal dignity (as one must), reviewing courts were given the daunting task of attempting to balance these interests, which is what the Court attempted to do in \textit{Gasperini}.

In \textit{Cooper}, the Leatherman Tool Group, Inc. sued a competing tool manufacturer for trade-dress infringement, unfair competition and false advertising when Cooper Industries, Inc. used Leatherman's advertising materials to promote Cooper's product.\textsuperscript{368} The jury returned a verdict in favor of Leatherman, which included a $50,000 compensatory award and a $4.5 million punitive award.\textsuperscript{369} Cooper made post trial motions to have the awards declared "grossly excessive" and therefore unconstitutional under \textit{BMW v. Gore}.\textsuperscript{370} The trial court denied the motion and Cooper appealed.\textsuperscript{371}

\textsuperscript{364} \textit{Id.} Of course, each of these mechanisms were later codified in the Federal Rules of Civil Procedure and judgment notwithstanding the verdict became a judgment as a matter of law.


\textsuperscript{368} Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424, 427-28 (2001).

\textsuperscript{369} \textit{Id.} at 426.

\textsuperscript{370} \textit{Id.} at 429-31.

\textsuperscript{371} \textit{Id.}
In an unpublished opinion, the Ninth Circuit affirmed the punitive damage award and determined that the district court had found that it was "proportional and fair" and that the size of the award "did not violate Cooper's due process rights." The Ninth Circuit then determined that "the district court did not abuse its discretion in declining to reduce the amount of the punitive damages." The Supreme Court granted certiorari to determine "whether the Court of Appeals reviewed the constitutionality of the punitive damages award under the correct standard and also whether the award violated the criteria" articulated in \textit{BMW}. \footnote{372 Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 205 F.3d 1351 (9th Cir. 1999).} \footnote{373 \textit{Id}.}{374 Cooper Indus., 532 U.S. at 431.}{375 \textit{Id}.}{376 \textit{Id}. at 433.}{377 The Seventh Amendment provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.} 

The Court concluded that the constitutional issues raised in connection with the awarding of punitive damages merited \textit{de novo} review. The Court started with the proposition that "[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court’s ‘determination under an abuse-of-discretion standard.’" Because issues of constitutional proportions are raised when punitive damages are awarded, however, this observation did not end the inquiry. The problem, of course, is that when a fact found by a jury is reviewed for anything other than abuse of discretion, it violates the Seventh Amendment prohibition on re-examination of the facts found by a jury.

In order to avoid this problem, the Court concluded that a punitive damage award was not a "fact" because of the nature of the punitive award itself. First, the Court made distinctions between the nature of compensatory and punitive damages:

Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its
imposition of punitive damages is an expression of its moral condemnation.\textsuperscript{378}

Thus, according to the Court,

[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a "fact" "tried" by the jury. Because the jury's award of punitive damages does not constitute a finding of "fact," appellate review of the District Court's determination that an award is consistent with due process does not implicate . . . Seventh Amendment concerns raised . . . \textsuperscript{379}

The Court acknowledged \textit{Barry v. Edmunds},\textsuperscript{380} in which it had held that, "it is the peculiar function of the jury to set the amount of punitive damages" and \textit{Day v. Woodworth},\textsuperscript{381} which held that punitive damages should be "left to the discretion of the jury." The Court distinguished these cases in a rather circular manner, by simply stating that the two cases "do not, however, indicate that the amount of punitive damages imposed by the jury is itself a 'fact' within the meaning of the Seventh Amendment's Re-examination Clause."\textsuperscript{382}

In a somewhat more satisfying analysis, the Court then distinguished the cases on historical grounds: "In any event, punitive damages have evolved somewhat since the time of respondent's sources. Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."\textsuperscript{383}

Justice Ginsburg, the lone dissenter and the author of the majority opinion in \textit{Gasperini}, was persuaded by neither analysis: "The Court . . . today asserts that a 'jury's award of punitive damages does not constitute a finding of fact' within the meaning of the Seventh Amendment. An ultimate award of punitive damages, it is true, involves more than the resolution of matters of historical or predictive fact."\textsuperscript{384}

However, she was concerned that because "a jury's verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings," and concluded that

\begin{itemize}
  \item \textsuperscript{378} \textit{Cooper Indus.}, 532 U.S. at 432 (citations omitted).
  \item \textsuperscript{379} \textit{Id.} at 437 (citations omitted).
  \item \textsuperscript{380} 116 U.S. 550, 565 (1886).
  \item \textsuperscript{381} 54 U.S. (13 How.) 363, 371 (1851).
  \item \textsuperscript{382} \textit{Cooper Indus.}, 532 U.S. at 437 n.11 (citations omitted).
  \item \textsuperscript{383} \textit{Id.} (citations omitted).
  \item \textsuperscript{384} \textit{Id.} at 446 (Ginsburg, J., dissenting) (citations omitted).
\end{itemize}
[p]unitive damages are thus not "[u]nlike the measure of actual damages suffered" in cases of intangible, noneconomic injury. One million dollars' worth of pain and suffering does not exist as a "fact" in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding, it seems to me the other should be so regarded as well.\textsuperscript{385}

The essential holding of Cooper, then, is that punitive damages awards, as distinct from compensatory damages awards, are not fact based, and, therefore, the Seventh Amendment is not implicated by permitting an appellate body to review such awards de novo. Gasperini and Cooper, read together, require federal appellate courts to review a district court's denial of a motion for new trial based on excessive compensatory damages under an abuse of discretion standard, but to review punitive awards de novo. Although cumbersome, that proposition, standing alone, is not terribly troublesome, particularly if one is persuaded by the reasoning in Cooper that punitive awards are not a finding of fact, as is, presumably, the determination of a compensatory award. Although that proposition is not an entirely logical one because, as Justice Ginsburg pointed out in her dissent, damages based on pain and suffering are considered compensatory, but are no more the product of an historical or predictive fact than is a punitive award.\textsuperscript{386}

Perhaps as troubling is the Court's repeated pronouncement that, for purposes of appellate review, there is no essential difference between compensatory and punitive awards. For example, the Court in Gasperini cited with approval the Second Circuit's observation that "[f]or purposes of deciding whether state or federal law is applicable, the question whether an award of compensatory damages exceeds what is permitted by law is not materially different from the question whether an award of punitive damages exceeds what is permitted by law."\textsuperscript{387} Likewise, in Honda Motor Co. v. Oberg, the Court stated that "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages."\textsuperscript{388} Thus, Cooper appears to be a departure in that sense as well.

Much more troubling is the Erie problem that arises under Cooper, particularly in light of Gasperini. As mentioned in Part I and detailed in Part III of this article, the majority of states confer much more deference to jury

\textsuperscript{385} Id. at 447 (Ginsburg, J., dissenting).
\textsuperscript{386} See id.
\textsuperscript{388} Honda Motor Co. v. Oberg, 512 U.S. 415, 422 n.2 (1994).
verdicts than that which is accorded by the Seventh Amendment. Where a federal appellate body is called upon to review a jury verdict in one of the states that has a heightened deference, under federal law, the reviewing court may review the compensatory portion of the award under the abuse of discretion standard, consonant with the state's interests in having jury verdicts "remain inviolate." When, however, the reviewing court is faced with a punitive damage award, presumably, Cooper commands that the punitive award be reviewed de novo. To the extent that de novo review is inconsistent with a jury verdict remaining "inviolate," however, such review probably impinges upon a state's legitimate interests in controlling its own sovereignty and impermissibly impinges upon the states substantive law, for recall that Gasperini held that standards of review are, at least in part, substantive for purposes of Erie analysis.

Indeed, the Court itself hinted at the problem in Cooper. It stated that,

We express no opinion on the question whether Gasperini would govern—and de novo review would be inappropriate—if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages. This might be the case, for example, if the State's scheme constrained a jury to award only the exact amount of punitive damages it determined were necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages (e.g., treble damages).

Moreover, the twin aims of Erie are likewise implicated. For example, a state has a substantive interest in giving litigants a sense of finality with respect to damage awards. This serves the purpose of the uniform application of the law. Secondly, if a state court would review an award under an abuse of discretion standard whereas a federal court is bound to review it de novo, a plaintiff's recovery could be much greater in state court. One could argue that this is an illusory problem because the plaintiff chooses the forum, but so long as the defendant has the ability to remove the case to federal court (as one must assume he does, since diversity is assumed for purposes of analyzing a potential Erie problem), the problem remains real.

The issue has already ripened in at least one jurisdiction. Recall that the standard of review in Washington is very deferential, having been restricted to abuse of discretion review and allowing verdicts to be overturned only

389. See supra Parts I and III.
391. Cooper, 523 U.S. at 440 n.13.
where the verdict "is outside the range of substantial evidence, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice."392 Yet, the Ninth Circuit held in Swinton v. Potomac Corp.393 that Cooper required it to review a punitive damages claim de novo. The district court in Swinton obtained subject matter jurisdiction on the basis of a federal question, but had the district court been sitting in diversity, the dilemma would surely have arisen.

Likewise, New Mexico and New Jersey, at least at the intermediate appellate level, appear to be rejecting the de novo review mandated by Cooper. What standard does the federal appellate court apply for cases being litigated in either of those two forums? Erie requires that the federal court adopt the standard of review adopted by the forum state, but Cooper commands otherwise.

One may object that it will not become an issue because Cooper itself permits deferential review of punitive awards, and it is only when the verdict is challenged as being constitutionally excessive that the award is subjected to constitutional review. That, however, is no answer because a defendant will always frame the objection as a constitutional one in order to assure the more stringent standard of review. Moreover, such a framework returns the state of the law to the uncomfortable position of assuming that the Fourteenth Amendment is of greater dignity than the Seventh Amendment, in effect allowing the former to "trump" the latter.

V. CONCLUSION

It is, of course, too soon to know how the lower courts will handle the problem, or how the Supreme Court ultimately will resolve it. But the fact remains that however correct the Court's decision in Cooper on the narrow question before it, the ramifications of Cooper will likely write yet another chapter in the Erie saga.

393. 270 F.3d 794 (9th Cir. 2001).